COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

SUPERIOR COURT
CIVIL ACTION
No. 1472CV00560

ERIN SULLIVAN, RANDOLPH MORGAN,
NANCY ANDREWS and URSULA PRICE,
Plaintiffs

v.

HERITAGE PLANTATION OF SANDWICH, INC.,
the TOWN OF SANDWICH, PAUL SPIRO, in his
capacity as TOWN OF SANDWICH BUILDING INSPECTOR,
THOMAS STANTON, and HAROLD MITCHELL,
ROBERT JENSEN, CHRISTOPHER NEEVEN,
ERIK VAN BUSKIRK, JAMES KILLION and
DAVID SCHRADER, in their capacities as
Members of the SANDWICH BOARD OF APPEALS,
Defendants

FINDINGS OF FACT, RULINGS OF LAW AND ORDER FOR JUDGMENT

Introduction

On November 17, 2014, Erin Sullivan, Randolph Morgan, Nancy Andrews and Ursula Price (collectively plaintiffs) filed suit against Heritage Plantation of Sandwich, Inc., the Town of Sandwich, Paul Spiro ("Mr. Spiro"), in his capacity as the Town of Sandwich Building Inspector, and Harold Mitchell, Robert Jensen, Christopher Neeven, Erik Van Buskirk, James Killion and David Schrader in their capacities as members of the Sandwich Zoning Board of Appeals (ZBA), The complaint contained three counts: Count I seeks review under G. L. c. 40A, §17; Count II

seeks review under G. L. c. 240, § 14A,[1] and Count III alleges violation of G. L. c. 143 § 12.[2]

Background

The Heritage Plantation of Sandwich, Inc. ("Heritage") obtained a building permit from Mr. Spiro to construct an outdoor adventure aerial park (AAP) as part of its facilities. Thomas Stanton ("Mr. Stanton") appealed the issuance of the building permit to the ZBA. On October 29, 2014, the ZBA issued a decision denying the appeal. The plaintiffs have applied to the court for judicial review under G. L. c. 40A, § 17 and seek injunctive and declaratory relief.

A jury waived trial was held before the undersigned over multiple days in October, November and December, 2017. Fifteen witnesses testified and 428 exhibits were admitted into evidence. The court, in the presence of counsel, took a view. Based on the credible evidence and reasonable inferences drawn therefrom and the view, the court makes the following findings of fact and rulings of law.

FINDINGS OF FACT

Parties

Plaintiff Randolph Morgan ("Mr. Morgan") is the owner of a condominium unit located at 67 Highview Drive in Sandwich, Massachusetts. Plaintiff Ursula Price ("Ms. Price") is the owner of a condominium unit located at 63 Highview Drive in Sandwich. Both Morgan's and Price's condominium units are located within a complex known as the Highview Condominiums

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[1]G.L. c. 240, § 14A permits a landowner to seek a determination of the extent to which a municipal ordinance or bylaw affects a proposed use or development of land.

[2]G.L. c. 143, § 12 authorizes the Superior Court to restrain the construction or use of a building or structure in violation of any town bylaw or ordinance.

("Highview"). As condominium unit owners, both Mr. Morgan and Ms. Price own a percentage interest in Highview's common areas. The common area abuts the property on which the AAP is located.

Plaintiff Erin Sullivan ("Ms. Sullivan") is the owner of a single family home located at 7 Jonathan Lane in Sandwich. Plaintiff Nancy Andrews (" Ms.Andrews") is the owner of a single family home located at 25 Pine Street in Sandwich.

Heritage is a Massachusetts nonprofit, charitable corporation organized pursuant to G. L. c. 180. It was incorporated on or about April 24, 1967. Ellen Spear ("Ms. Spear") is the President and Chief Executive Officer of Heritage. Heritage has operated the Heritage Museums and Gardens (HMG) in Sandwich for the last fifty years. It is located on a parcel of land approximately one hundred acres in size.

Heritage's Articles of Organization state the purposes of the corporation as follows:

> "Creating, maintaining and operating in the Town of Sandwich in the Commonwealth of Massachusetts and in other towns on Cape Cod a museum or museums for the display to the public of antique buildings, works of art, household furnishings, machinery, equipment, weapons, hand carvings, artifacts, miniatures, boats, conveyances and other objects of historic interest; to educate the public in colonial and early American history and in the life and work of the early settlers and their descendants; to increase the knowledge and appreciation of the public of the American heritage; and to raise and expend funds for said purposes."

HMG's exhibits include collections of art, antique automobiles, and an antique carousel. Heritage also maintains acres of gardens principally displaying rhododendrons and hydrangeas. In 2011, Heritage opened a two acre outdoor play area for small children called "Hidden Hollow." Also located on HMG's property is a licensed preschool, "The Hundred Acre School," which focuses on the STEM (Science, Technology, Engineering and Math) curriculum.

On November 7, 2013, Heritage's Board of Trustees adopted a written Master Plan,

intending to develop new exhibits and update existing exhibits. The Master Plan provided, inter alia, that its objective was:

> "To develop a plan that advances Heritage's mission to inspire people of all ages to explore, discover and learn together, and to be true to our founder's charge that Heritage 'be a living, outreaching force for education' which facilitates outdoor learning, discovery and social interaction."

One feature of the Master Plan was an "Aerial Adventure Area." Prior to the formal adoption of the Master Plan, Ms. Spear contacted Outdoor Venture Group, LLC ("OVG"), a developer of aerial adventure parks (AAPs) throughout the country, in order to gauge its interest in developing and operating an AAP on Heritage's property. OVG is a for profit commercial enterprise.

Eventually, OVG sent a proposal to Heritage wherein it proposed to develop an AAP consisting of eight aerial courses. Thereafter, OVG and Heritage entered into an agreement with respect to the development and operation of an AAP. To that end, two new corporate entities were formed, HMG, LLC and Adventure Park at Heritage Museums and Gardens, LLC ("AP LLC"). HMG, LLC's sole member is Heritage, and its place of business is 67 Grove Street in Sandwich. AP LLC's purpose is, in relevant part, "owning, constructing, and operating an educational, aerial adventure feature" on leased property at Heritage Museums and Gardens. AP LLC has two members: HMG, LLC and OVG. OVG holds a 51% majority ownership interest while HMG, LLC holds a 49% ownership interest in AP LLC. Bahram Avram, the president of OVG, is its manager.

Pursuant to the operating agreement, OVG has constructed and operated the AAP. It hires, supervises and pays all employees of the AAP. Heritage plays no part in the operation of the AAP and none of its employees are employed by OVG.

The leased property upon which the AAP was constructed is an approximately four acre

parcel designed as Parcels Nos. 1 and 2 on Sandwich Assessors Map No. 37. The AAP is located in a residential (R-1) zoning district. The neighborhood in which the AAP lies is encapsulated, in large part, by Route 130, a Massachusetts State Highway which loops around it. For local traffic, Route 130 provides a ready bypass around the neighborhood, which is accurately described as insular, private and scenic. There are approximately 280 homes and condominiums located within. Those traveling on the roads within the neighborhood are primarily either residents, visitors to the museum or the AAP, or otherwise lost.

Three streets, Shawme Road, Pine Street and Grove Street, provide access off Route 130. They are residential in nature. There are no sidewalks on Shawme Road or Pine Street. Shawme Road, in particular, is, in part, a narrow, winding, unpaved road with some area of pronounced drop offs and less than adequate guardrails. It is often used by residents of the neighborhood for walking and other forms of exercise.

The Permitting Process

The AAP is located in the Old King's Highway Regional Historic District ("OKRHD"). The OKRHD was created by a Special Act of the Legislature, Chapter 470 of the Acts of 1973 ("the Act"). Section 4 of the Act established the Old King's Highway Regional Historic District Commission ("the Commission"). Section 5 of the Act established separate Town Historic District Committees for nine individual towns, including Sandwich. Pursuant to Section 6 of the Act, no structure is allowed to be constructed within the district without a Certificate of Appropriateness (COA) from the local Historic District Committee (the "Committee"). Section 9 of the Act provides that the Committee is to give fourteen days notice by local newspaper publication and seven days notice to the owners of property abutting the premises of the application as they appear on the most recent tax list and date of the hearing.

Heritage applied for a COA on April 1, 2014 and the Committee held a hearing on the application on April 23, 2014. After the hearing, the Committee approved the application and issued COA #14-43. The application incorrectly listed the address of the AAP as 67 Grove Street, assessors map 37, Lot 6. The correct address is 0 Pocasset Rd. Map 37, Lot 1 and 0 Shawme Road Map 37, Lot 2. Mr. Morgan and Ms. Price are not abutters to the property located on Map 37, Lot 6 and consequently did not receive notice of the application or the Committee's hearing. They are, however, abutters to 0 Pocasset Rd. Map 37, Lot 1 and 0 Shawme Road Map 37, Lot 2.

Mr. Morgan learned of the issuance of the COA in early June 2014. Ms. Price learned of it somewhat later in September 2014. Neither contacted the Committee or the Commission, or sought an appeal to the Barnstable Superior Court.[3]

The Building Permit Applications

On April 24, 2014, Heritage submitted to Mr. Spiro an application for a building permit to construct the AAP and two yurts.[4] The building permit application again incorrectly listed the address of the AAP project as 67 Grove Street, Map 37 Lot 6. The application was at first denied "due to insufficient information." Thereafter, Heritage supplied additional materials including proposed plot plans.

On September 18, 2014, Mr. Spiro issued a building permit authorizing the construction of the AAP ("the Building Permit"). Mr. Spiro originally thought that the AAP would require a variance but subsequently altered his position after consulting with Town Counsel. In granting

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[3] Section 11 of the Act provides for a further appeal from the decision of the Commission to the Barnstable Superior Court.

[4] A yurt is a round, tent type structure usually covered with skins

the permit, Mr. Spiro concluded that since the AAP was located in Residential 1 Zoning District, it was allowed by right as a museum use as permitted by Section 2300, Table of Uses of the Zoning ByLaw. He also concluded it was entitled to the protections of the Dover Amendment, G. L. c. 40A, § 3, as it had a significant educational component that would afford it an exemption from zoning use regulations.

On or about September 26, 2014, a Sandwich resident, Mr. Stanton, appealed Heritage's Building Permit pursuant to G. L. c. 40A, § 8. The ZBA scheduled a hearing on Mr. Stanton's appeal for October 28, 2014. Notice of the October 28, 2014 ZBA hearing was posted in The Sandwich Enterprise on October 3 and 10, 2014.

The ZBA scheduled a site visit on Saturday, October 25, 2014 and posted an agenda on October 22, 2014. The notice incorrectly identified the site as 67 Grove Street. However, the site visit was held at 0 Shawme Road and 0 Pocasset Road. Abutters Mr. Morgan and Ms. Price did not receive any notice of the site visit, did not know about it, and consequently did not attend. During the site visit, members of the ZBA posed questions to Ms. Spear about the location of the AAP. However, the members of the public who did attend were not allowed to ask questions and the members of the ZBA did not deliberate.

Mr. Morgan and Ms. Price received notice of the ZBA's October 28th public hearing although neither chose to attend.[5] On October 28, 2014, the ZBA heard presentations from Heritage and members of the public. Following the presentations, the ZBA voted to close the public hearing and take the matter under advisement. Later that evening, it commenced deliberations and received an additional oral presentation from Mr. Spiro. It then voted unanimously to deny the Appeal. The ZBA filed a written decision, quite cursory in nature,

[5] Ms. Sullivan and Ms. Andrews were not entitled to receive notice of the hearing.

which simply stated that the appeal "does not provide substantial evidence to overturn the decision of the Sandwich Building Inspector or demonstrate the lack of educational use of the property." The decision was filed with the Sandwich Town Clerk on October 29, 2014. This appeal followed.

The Construction of the AAP

The AAP was constructed in late 2014 and early 2015 following the denial of the appeal by the ZBA. It opened for business on May 15, 2015. The original design called for eight aerial trails ("courses") and the two yurts. However, only five courses and the yurts have been constructed to date. If successful in this litigation, AP LLC intends to construct three additional courses and offer night climbing up to and including 10:00 p.m., which will substantially increase the number of the AAP's customers and, consequently, the traffic on the roads.

The AAP is essentially an obstacle course in the trees. The five existing courses have varying levels of difficulty. The courses are akin to ski trails and are designated as yellow, green (2), blue, and black, according to the level of difficulty. There is a minimum age requirement for each level of difficulty. Each course consists of "bridges" between wood tree platforms. The platforms are constructed at different heights. The bridges are constructed of ropes, cables and wood. There is no motorized component. Climbers are attached to the cables by means of a harness and safety clip as they maneuver over the courses and through the trees. There are also nine zip lines within the AAP.

Prior to initial ascent, each climber must undergo a safety orientation of approximately thirty minutes duration. Each climber is instructed in the use of the harness and safety clip, and on how to climb and use the zip lines. After the orientation, the climbers begin their climb. The time it takes to complete a particular course depends on the individual climber's agility and

strength. A climber first chooses a particular course suited to his or her skill level, climbs to one of the platforms attached to the trees and progresses along the particular course. Once tree borne, the climbers are on their own, with no further instruction provided. When a climber completes a course, he or she may return to the starting point and repeat the particular course or choose a different one. Climbers are entitled to use the AAP for a total of two hours and thirty minutes including orientation.

There are also two yurts constructed on the AAP grounds. One is devoted to administrative functions. The second houses equipment, the ticket office, and a small concession area.

Admission to the AAP requires the payment of an admission fee separate from the fee paid for admission to the HMG. In 2015, the daily admission fee for the AAP was $43.00. The fee for the HMG was $18. Combination tickets were available for $53.00. The year 2017 saw a price increase of $45.00 for admission to the AAP.

In its inaugural season, the AAP was open from May 15, 2015 until November 7, 2015 for a total of approximately 132 days. The hours of operation extended from 9:00 a.m. to 6:00 p.m. Approximately 19,361 patrons visited the AAP that year. The vast majority, approximately 18,000, eschewed the combination ticket and purchased tickets only to the AAP.

In 2016, the AAP opened approximately one month earlier, on April 16, 2016, and remained open until November 13, 2016. The hours of operation were extended from 8:00 a.m. to 8:00 p.m. Approximately 31,145 patrons visited the AAP that season. Of those, approximately 29,250 visitors purchased individual tickets only. Only 1,889 visitors purchased a combination ticket. Approximately 35,000 climbers visited the AAP in 2017 and approximately 50,000 customers are projected to attend in 2018.

Heritage is acutely aware that in order to enjoy the protections of the Dover Amendment it must establish that the predominate use of the AAP is educational. To that end, it has employed three measures to inject the AAP with educational content. One such step was the annexation of five signs to trees along the aerial courses which Heritage contends teach principles of physics. The signs are small and contain brief statements regarding such topics as inertia and gravity. This court finds that these signs are, at best, of negligible educational value to the climbers who are hardly as concerned with principles of physics as they are for their safety and remaining aloft.

Heritage has also developed a dirt path ("the Ground Path") on the land under the AAP. The Ground Path is delineated by a rope and is less than 10 feet wide. Along the Ground Path are 10 posts to which signs are attached which provide information about the trees, plants and insects which live in the forest. While these signs are of some educational value, the Court finds that the Ground Path, other than the fact that it lies under the AAP, has no discernible connection to it. Admission to the Ground Path is free and does not require the purchase of a ticket to the AAP. Customers of the AAP and HMG may, without charge, wander through the path if they so choose but are not required to do so.

As a third measure, Heritage has offered separate workshops to youth and school groups exclusively which it contends are part of the AAP. Each workshop costs $11 to attend, a charge separate from the $45 AAP admission charge. These offerings include workshops such as "Math Adventure" and "Eco Adventur". Workshop attendees may attend the workshops without using the AAP and, conversely, may use the AAP without attending a workshop. Other than the fact that school or youth groups may purchase a ticket for both, there is no connection between the AAP and the workshops. Of the 28 school or camp groups that visited the AAP between June 6, 2016 and July 2, 2016, none participated in a workshop.

The Impact of the AAP on the Plaintiffs

The plaintiffs allege that the AAP has had a negative impact on them in three distinct ways: (1) an increase in traffic and congestion of the streets, (2) the proliferation of trash in the neighborhood; and (3) a diminution in their property values. Where plaintiffs allege several claims of aggrievement, they only need to satisfy their burden of proof with respect to one claim in order to establish standing. See *81 Spooner Rd., LLC* v. *Zoning Bd. of Appeals of Brookline*, 461 Mass. 692, 704 n. 16 (2012); *Krafchuk* v. *Planning Bd. of Ipswich*, 453 Mass. 517, 523 n. 13, (2009).

1. Traffic

There are only three town roads, Grove Street, Pine Street and Shawme Road, which provide access to the neighborhood and the AAP. All parties agree that the AAP has resulted in an increase of traffic on the neighboring streets. The question is the degree of the impact.

The plaintiffs and the defendants each offered competing expert opinions on the effect of the increased traffic. The plaintiffs' expert, Kim Hazarvartian, compared the traffic counts on August 14, 2015, when the AAP was operational, with the traffic counts taken on December 4, 2015, when the Park was closed. His analysis suggested that over 600 vehicles trips per day were occasioned by the AAP. This court is not convinced of the reliability of his estimate or methodology, particularly in view of the limited data compiled and his failure to consider an adjustment for the increase of summer traffic on Cape Cod.

The defendants offered the testimony of Patrick Dunford. Mr. Dunford studied traffic counts and vehicle speed, and conducted roadway capacity analyses for 2015, 2016 and 2017. On August 28, 2015, the busiest day of those tested in 2015, there were 536 trips to and from (270 entering and 260 leaving) the parking field adjacent to the AAP. However, the AAP had only 160

climbers indicating that some of those who parked in the grassy field patronized the museum.

Similarly, on September 2, 2016, there were 696 trips to and from (348 entering and 348 leaving) the parking field adjacent to the AAP. On that day the AAP had 198 climbers, again suggesting that patrons of HMG used the grassy field to park.

Prior to the 2017 season, Heritage constructed paved parking lots on once grassy fields across Shawme Road from the AAP. These lots were closer to the museum and as a result museum attendees were less likely to park on the grassy field adjacent to the AAP. As a result, in 2017, the number of vehicles entering the grassy field lot dropped. On August 11, 2017, there were 375 trips (187 entering and 188 exiting) to and from the grassy field. There were 327 climbers that day.

All of these figures provide but a bare bones basis estimate as to the amount of additional traffic generated by the AAP. There is no reliable data on the number of passengers per vehicle who entered any of the parking lots and patronized the AAP. On the other hand, there may have been visitors to the AAP who were not patrons but simply curious. I credit Mr. Dunford's testimony that only a small portion of the road capacity was utilized after the construction of the AAP and that there has been no appreciable traffic delays caused by the congestion of the streets. Even if one were to accept Mr. Hazarvartian's estimate of an additional six hundred trips per day, that amount of traffic is spread over three roads, albeit likely unevenly. However, if one were to assume that each road bore an equal amount of cars (200) over an eight hour period that would amount to 25 cars per hour or one car per 2.4 minutes.

II. Trash

The plaintiffs also allege that there has been an increase in trash along Shawme Road due to the AAP. During the view, the court observed evidence of discarded items, such as nip bottles

and styrofoam cups, along the road but to no greater degree than any other roadscape. Moreover, the plaintiffs have failed to establish any evidentiary nexus between the litter and the AAP.

III. Loss of Market Value in the Plaintiffs' Properties

The plaintiffs offered expert testimony with respect to the loss of value of their homes due to the location of the AAP within the neighborhood. Surprisingly, Heritage did not offer expert testimony, but instead relied upon a vigorous cross-examination of the plaintiffs' expert, Ellen MacDonald. Ms. MacDonald, whom this court finds to be an experienced and qualified real estate appraiser, compared the four subject properties with similar properties outside of the neighborhood. She opined that the properties suffered a loss in market value of approximately 10% after construction of the AAP, due to the increase in traffic and the introduction of a commercial enterprise into a residential neighborhood, particularly one that is viewed as rural, scenic and historic. I credit that opinion. Ms. MacDonald relied on MLS and Warren databases, which track sales through the town assessors office and the registry of deeds. Ex 416 and 417. She compared the four plaintiffs' properties with comparable properties and found that the plaintiffs' properties each had suffered a diminution in value resulting from the introduction of the AAP into the neighborhood. In particular, 63 Highview Drive suffered a loss in value from $253,000 to $230,000; 67 Highview Drive suffered a loss in value from $250,000 to $237,000; 7 Jonathan Lane suffered a loss in value from $568,000 to $477,000 and 25 Pine Street had suffered a loss in value from $385,000 to $325,000. Ms. MacDonald also testified credibly that properties in the neighborhood stayed on the market longer than properties in other areas of Sandwich leading to depressed selling prices and in some cases, withdrawal of the property from the market. Her testimony constitutes credible evidence which establishes that the fair market value of the plaintiffs' properties has been reduced by the AAP.

RULINGS OF LAW

I. PLAINTIFFS' STANDING

The first issue to be resolved is whether the plaintiffs have standing under G.L. c. 40A, § 17 to challenge the issuance of the Building Permit. "[O]nly a 'person aggrieved' has standing to challenge a decision of a zoning board of appeals." *81 Spooner Rd., LLC* v. *Zoning Bd. of Appeals of Brookline*, 461 Mass. 692, 700 (2012), quoting G.L. c. 40A, § 17. A person aggrieved is one who has suffered some infringement of his legal rights. *Id.* at 700.

Because they are statutorily entitled to notice of ZBA proceedings, abutters are entitled to a rebuttable presumption that they are aggrieved persons with standing to challenge a ZBA decision. *81 Spooner Rd., LLC* v. *Zoning Bd. of Appeals of Brookline*, 461 Mass. at 700; *Marshalian* v. *Zoning Bd. of Appeals of Newburyport*, 421 Mass. 719, 721 (1996). The parties agree that Mr. Morgan and Ms. Price, as abutters to the locus, are presumed to be "persons aggrieved." A defendant challenging the presumption of aggrievement must offer evidence warranting a finding contrary to the presumed fact. *Kenner* v. *Zoning Bd. of Appeals of Chatham,* 459 Mass. 115, 118 (2011). If the defendant does so, the presumption disappears and the court will determine standing based on all the evidence. *Id.*; *Marshalian* v. *Zoning Bd. of Appeals of Newburyport*, 421 Mass. at 721. The plaintiff then must present credible evidence, by direct facts and not speculative personal opinion, that his injury is special and different from the concerns of the rest of the community. *81 Spooner Rd., LLC* v. *Zoning Bd. of Appeals of Brookline*, 461 Mass. at 701; *Kenner* v. *Zoning Bd. of Appeals of Chatham,* 459 Mass. at 118.

Ms. Sullivan and Ms. Andrews are not abutters and do not enjoy the same presumption of standing. They must show some infringement of their legal rights causing more than minimal or slightly appreciable harm. *Kenner* v. *Zoning Bd. of Appeals of Chatham,* 459 Mass. at 121;

Marshalian v. *Zoning Bd. of Appeals of Newburyport*, 421 Mass. at 721. To confer standing, the right or interest asserted by the plaintiff must be one that G. L. c. 40A or the ordinance or bylaw at issue is intended to protect. *Standerwick* v. *Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 30 (2006).

Further, "[t]he adverse effect on a plaintiff must be substantial enough to constitute actual aggrievement such that there can be no question that the plaintiff should be afforded the opportunity to seek a remedy.... Put slightly differently, the analysis is whether the plaintiffs have put forth credible evidence to show that they will be injured or harmed by proposed changes to an abutting property, not whether they simply will be 'impacted' by such changes." *Picard* v. *Zoning Bd. of App. of Westminster*, 474 Mass. 570, 573 (2016), quoting *Kenner* v. *Zoning Bd. of Appeals of Chatham,* 459 Mass. at 122. Credible evidence includes both a quantitative and a qualitative component. Quantitatively, the evidence must provide specific factual support for each claim of particularized injury made by the plaintiff. *Butler* v. *City of Waltham*, 63 Mass. App. Ct. 435, 441 (2005). Qualitatively, the evidence must be the type on which a reasonable person could rely to conclude that the claimed injury likely will flow from the ZBA's decision. *Id.* Conjecture, personal opinion, and hypothesis are therefore insufficient.

Here, all of the plaintiffs, abutters and non-abutters alike, have put forth credible evidence to show that their interests have been injured or harmed by the AAP. Section 1100 of the Sandwich Bylaw provides in pertinent part:

> The purpose of this Bylaw is to provide for the Town of Sandwich all of the protection authorized by the General Laws of the Commonwealth of Massachusetts, Chapter 40A and any amendments thereto - namely the promotion of the public health, safety, convenience and welfare by: . . .
>
> c. Conserving the value of land and buildings, including the conserving of natural resources and the preventing of blight and pollution of the environment.

d. Lessening the congestion of traffic.

The plaintiffs have endeavored to demonstrate that the increase in traffic and corresponding increased congestion of the three roads constitutes a substantial enough harm to entitle them to relief. While they have produced sufficient evidence to prove that they have been impacted, that is not enough. They must show that they have been more than minimally harmed. See *Kenner* v. *Zoning Bd. of Appeals of Chatham,* 459 Mass. at 121. Their evidence falls short in that respect.

However, diminution in property value can be a sufficient basis for standing where it is derivative of or related to cognizable interests protected by the applicable zoning scheme. *Id.* at 123. I credit the testimony of the plaintiffs' expert, Ms. McDonald, that the plaintiffs have suffered a diminution in their property values of approximately 10% due to the increase in traffic and the introduction of a commercial enterprise into a residential neighborhood. The neighborhood is rural, scenic and historic, and the AAP alters the character of the neighborhood. Heritage has not submitted its own expert testimony or otherwise shown that the plaintiffs' allegations of harm are unfounded or de minimis. See *Picard* v. *Zoning Bd. of App. of Westminster*, 474 Mass. at 573; *81 Spooner Rd., LLC* v. *Zoning Bd. of Appeals of Brookline*, 461 Mass. at 702-703. This court concludes that the plaintiffs successfully put forth credible evidence to establish that their injury is special and different from the concerns of the rest of the community. Accordingly, they have standing to appeal the ZBA's decision.

II. MERITS OF THE APPEAL

Pursuant to G. L. c. 40A, § 17, the reviewing court hears the case, makes de novo factual findings based solely on the evidence admitted in court, and then, based on those facts, determines

the legal validity of the ZBA's decision with no evidentiary weight given to any findings by the board. *Shirley Wayside Ltd. P'ship* v. *Board of Appeals of Shirley*, 461 Mass. 469, 474 (2012); *Roberts* v. *Southwestern Bell Mobile Sys., Inc.*, 429 Mass. 478, 485-486 (1999). First, the court must determine whether the ZBA acted in accordance with the proper standard or, instead, on a "legally untenable ground," requiring its decision to be vacated. *Roberts* v. *Southwestern Bell Mobile Sys., Inc.*, 429 Mass. at 486. In determining whether the ZBA's decision was based on a legally untenable ground, the court must analyze whether it was decided on a standard, criterion, or consideration not permitted by the applicable statutes or by-laws. The approach is deferential only to the extent that the court gives 'some measure of deference' to the local board's interpretation of its own zoning by-law. In the main, though, the court determines the content and meaning of statutes and by-laws and then decides whether the ZBA has chosen from those sources the proper criteria and standards to use in deciding to approve the grant of the building permit. *Shirley Wayside Ltd. P'ship* v. *Board of Appeals of Shirley*, 461 Mass. at 474-475.

Second, even if the proper standard was applied, the court must ascertain, on the facts the court has found, whether the ZBA's decision was unreasonable, whimsical, capricious or arbitrary. *Shirley Wayside Ltd. P'ship* v. *Board of Appeals of Shirley*, 461 Mass. at 475. See also *Wendy's Old Fashioned Hamburgers of New York Inc.* v. *Bd. of Appeals of Billerica*, 454 Mass. 374, 380-383 (2009). The question for the court is whether, on the facts the judge has found, any rational board could come to the same conclusion. *Shirley Wayside Ltd. Partnership* v. *Bd. of Appeals of Shirley*, 461 Mass. at 475. The judge should overturn the ZBA's decision when no rational view of the facts found by the court supports the ZBA's conclusion or if the reasons given by the board lack a substantial basis in fact and are in reality mere pretexts for arbitrary action or veils for reasons unrelated to the purposes of the zoning law. *Id.*

Improper Motive or Action by ZBA

The plaintiffs first contend that the Building Permit is invalid because the ZBA acted with improper motives. They rely on the Appeals Court statement that:

> "we assume, without deciding, that the board's approval of the subdivision plan would have to be annulled if it were shown that the approval was actuated by improper motives of the members of the board, such as a motive to do favors for friends, heedless of the consequences to the public."

Arrigo v. *Planning Bd. Of Franklin*, 12 Mass. App. Ct. 802, 811 (1981), rev. den., 385 Mass. 1101 (1982). However, "if a proper motive is essential to the regularity of the official act, it follows from the presumption of regularity that the motive must be assumed to be proper until the contrary is shown." *Id.* "There is every presumption in favor of the honesty and sufficiency of the motives actuating public officers in the actions ostensibly taken for the general welfare." *Id.*; *Foster from Gloucester, Inc.* v. *City Council of Gloucester*, 10 Mass. App. Ct. 284, 294 (1980). Thus, a party asserting a claim of improper motive bears the burden of proof. *Arrigo v. Planning Bd. of Franklin*, 12 Mass. App. Ct. at 811; *Wheatley* v. *Planning Bd. of Hingham*, 7 Mass. App. Ct. 435, 448 (1979).

Here, plaintiffs claim that Mr. Spiro wrongfully issued the Building Permit in response to political pressure from the Town Manager. This presents a somewhat atypical situation, in that the plaintiffs inferentially allege that town officials exerted pressure on Mr. Spiro to issue the Building Permit, not as a favor to Heritage, but conversely, to get Ms. Spear, the President and CEO of Heritage, colloquially speaking, "off their backs." The evidence establishes that in acting as a determined advocate for the AAP, Ms. Spear was hard charging, persistent, and in the words of the Town Manager, "a pest." There was, of course, nothing wrong with her aggressive

advocacy for her employer's cause. Moreover, although her personal style may have been off-putting to some, there is no credible evidence of any nefarious conduct on her part.

There is also nothing in the evidentiary record which remotely establishes any improper motive by Mr. Spiro or the ZBA. Indeed, Mr. Spiro originally denied the application for want of sufficient detail, insisted on proper documentation, and sought the advice of town counsel on the issue of whether a platform was a structure within the meaning of the ByLaw. Based on the evidence, I find no improper motive or conduct on the part of any of the defendants. Because the plaintiffs have failed to rebut the presumption of regularity and cannot show that the approval was actuated by the improper motives of the zoning officials, there is no basis to annul the Building Permit.

Failure to Give Notice of Site Visit

Mr. Morgan and Ms. Price contend that their failure to receive notice of the ZBA's site visit requires annulment of the Building Permit. That site visit took place on October 25, 2014, in advance of the actual hearing on October 28, 2014. Plaintiffs argue that the site visit was the first part of the public hearing to which they were entitled to notice.

I conclude that the October 25, 2014 site visit was not a public hearing and that as such, notice was not required pursuant to G.L. c. 40A, § 11.[6] Site visits are frequently used by local

[6]Section 11 provides in relevant part: "In all cases where notice of a public hearing is required notice shall be given by publication in a newspaper of general circulation in the city or town once in each of two successive weeks, the first publication to be not less than fourteen days before the day of the hearing and by posting such notice in a conspicuous place in the city or town hall for a period of not less than fourteen days before the day of such hearing. In all cases where notice to individuals or specific boards or other agencies is required, notice shall be sent by mail, postage prepaid. 'Parties in interest' as used in this chapter shall mean the petitioner, abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner as they appear on the

boards as an information gathering exercise. *Gamache* v. *Acushnet*, 14 Mass. App. Ct. 215, 222 (1982). The purpose is to provide board members the opportunity to view the property in question and familiarize themselves with the attendant conditions. During the site visit, which lasted approximately one hour, members of the ZBA questioned Heritage's representatives regarding the location of the AAP and the claim that the AAP would be educational.

During a public hearing, the public is invited to attend and express their views either orally or in writing about the particular project at hand. See, e.g., *Milton Commons Ass'n* v. *Board of Appeals of Milton,* 14 Mass. App. Ct. 111, 115 (1982) (holding, in a case arising under G.L. c. 40B, that certain proceedings were not part of the public hearing because the public was not allowed to speak: "[p]ublic hearings end when the right of interested parties to present information is cut-off."). Those members of the public who attended the October 25, 2014 site visit were not allowed to participate. Accordingly, I conclude that the site visit was not part of a public hearing requiring notice.

In any event, a party must show that it is prejudiced by a lack of mailed notice before it can attack a decision. *Kasper* v. *Bd. of Appeals of Watertown*, 3 Mass. App. Ct. 251, 257 (1975). Where, as here, imperfect notice is given but the aggrieved person can and actually does file their Chapter 40A claim in a timely fashion, the plaintiff must show prejudice resulting from the defect. See *Chiuccariello* v. *Building Comm'r of Boston*, 29 Mass. App. Ct. 482, 486 (1990) ("[s]uccessful attack on a board's decision, in the face of actual notice but in the absence of statutorily required notice, should be restricted to circumstances where prejudice is demonstrated."); *Gamache* v. *Acushnet*, 14 Mass. App. Ct. at 219-220 (finding no prejudice where despite improper notice, plaintiff appeared at hearing with counsel).

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most recent applicable tax list . . ."

The plaintiffs have failed to demonstrate such prejudice. Ms. Price and Mr. Morgan had notice of the ZBA's October 28, 2014 public hearing but elected not to attend. Plaintiffs' argument that their attendance at the site visit would have better prepared them for the October 28 hearing is unavailing when neither even made an effort to attend that public hearing. Accordingly, the failure to provide Mr. Morgan and Ms. Price with notice of the October 25 site visit does not require annulment of the Building Permit.

Failure to Give Notice of Sandwich Historic Committee Hearing

The Plaintiffs further contend that this Court should annul the Building Permit because Mr. Morgan and Ms. Price did not receive notice of a hearing held by the Sandwich Historic District Committee on the issuance of a COA. As noted *supra*, under Section 9 of the Special Act creating Old King's Highway Regional Historic District Commission, abutters are entitled to seven days notice of the hearing on an application for a COA. Under Section 11, a person aggrieved may appeal a COA to the Commission within twenty days and thereafter, may appeal the Commission's decision to Superior Court within thirty days. See Stat. 1973, c. 470, §§ 9, 11. Here, where Mr. Morgan and Ms. Price never received notice of the hearing on the COA, they were unable to challenge its issuance through this appellate process.

However, the plaintiffs cite no authority, nor has this Court found any, for the proposition that the remedy for lack of notice of a hearing on a COA is annulment of a subsequently issued Building Permit. Rather, analogizing to the case law governing notice defects under Chapter 40A, the lack of notice tolled the limitation period for appealing the COA until the plaintiffs received actual notice of its issuance. See *Kramer* v. *Zoning Bd. of App. of Somerville*, 65 Mass. App. Ct. 186, 194-195 (2005). Mr. Morgan learned of the issuance of the COA in early June of

2014 and Ms. Price learned of it in September of 2014, but neither contacted the Committee or the Commission within twenty days, or sought an appeal to the Barnstable Superior Court. Having failed to do so, they cannot now launch a collateral attack on the COA in the context of appealing the Building Permit.[7]

Dover Amendment Protection

The ZBA upheld the Building Inspector's determination that the issuance of a building permit was proper because the AAP was entitled to the protection of G.L. c. 40A, § 3 ("the Dover Amendment"), and therefore was not subject to any prohibition or limitation imposed by local zoning by-laws. Potentially applicable limitations include that the Bylaw does not permit an Amusement Park use in an R-1 District and permits an Outdoor Recreation Facility only by special permit granted under Section 1330 of the Bylaw.[8]

The Dover Amendment provides, in relevant part:

> "[N]or shall any [zoning] ordinance or by-law prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements".

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[7]This Court therefore need not address the plaintiffs' arguments that the COA improperly was issued based on incomplete drawings rather than an engineered plan and that the AAP includes structures visible from a public way that were not included in the COA.

[8]The Bylaw defines a "Recreation Facility" as "Indoor or Outdoor sports facilities or athletic clubs including but not limited to, playing fields, courts, pools or ice rinks, rock climbing walls, or other sports areas, spectator facilities and other structures accessory to general athletics and recreation."

G. L. c. 40A § 3. The Dover Amendment strikes a balance between preventing local discrimination against educational uses and honoring legitimate municipal concerns that are expressed through local zoning laws. *Trustees of Tufts Coll.* v. *Medford*, 415 Mass. 753, 757 (1993).[9]

The Dover Amendment protects only those uses of land that have as their bona fide goal something that can reasonably described as educationally significant. *Regis Coll.* v. *Weston*, 462 Mass. 280, 285 (2012). In addition, the educationally significant goal must be the primary or dominant purpose for the use of the land. *Id.*; *Whitinsville Retirement Society, Inc.* v. *Northbridge*, 394 Mass. 757, 760 (1985).

Education is a broad and comprehensive term that is not limited to traditional educational institutions. *Regis Coll.* v. *Weston*, 462 Mass. at 286. "It has been defined as 'the process of developing and training the powers and capabilities of human beings.' To educate . . . is 'to prepare and fit for any calling or business, or for activity and usefulness in life.' Education may be particularly directed to either the mental, moral, or physical powers and faculties, but in its broadest and best sense it relates to them all." *Whitinsville Retirement Soc., Inc.* v. *Northbridge*, 394 Mass. at 759. Purely recreational uses are not "educational." *Regis Coll.* v. *Weston*, 462 Mass. at 287. While the AAP involves essentially a recreational use, it could be said to serve some, albeit minimal, educational purposes.

However, to be entitled to the protection of the Dover Amendment, the primary or

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[9]As an initial matter, Heritage does not operate the AAP. AP LLC does. AP LLC has two members: HMG, LLC and OVG. OVG holds a 51% majority ownership interest. It is a for profit company. The protections and benefits of the Dover Amendment are intended for nonprofit educational corporations. To allow the type of arrangement extant here would defeat the purpose of the statute and provide an easy end run around the nonprofit requirement.

dominant purpose of the AAP must be educational. This requirement helps ensure that a party invoking Dover Amendment protection does so without engrafting an educational component onto a project in order to obtain favorable treatment under the statute. *Regis Coll.* v. *Weston*, 462 Mass. at 290. Based on the evidence adduced at trial, any educational purposes of the AAP do not predominate over the recreational components so as to receive the protection of the Dover Amendment. The court must look beyond individual activities, some of which may in isolation constitute educational use, to see whether, in the aggregate, the overall use of the AAP is educational. The educational use must be the "primary or dominant purpose" of the land to qualify under the Dover Amendment. *Whitinsville Retirement Society, Inc.* v. *Northbridge*, 394 Mass. at 760.

Engrafting educational content onto the AAP is precisely what Heritage has endeavored to do here. Heritage has tried to satisfy the primary or dominant educational use requirement in three different ways: (1) by the annexation of five signs to the trees which are alleged to describe principles of physics; (2) by the development of a ground path underneath the AAP; and (3) offering certain workshops to school groups. These minor educational components do not make the AAP a primarily educational use. Although the AAP includes some instruction, the safety orientation and the workshops, and some basic information about physics and plant and insect life, I conclude that the predominant use of the AAP is for recreational and exercise purposes which are not educational purposes under the Dover Amendment. The AAP offers an activity which is decidedly primarily recreational and athletic in nature. See *Metrowest YMCA, Inc.* v. *Hopkinton*, 2006 WL 1881885 at *8 (Land Ct.) (although some instruction and classes were offered there, YMCA was used for predominantly recreational and exercise purposes and therefore was not entitled to Dover Amendment protection).

The evidence establishes that the AAP is marketed to the hard core athlete and active lifestyle enthusiast as opposed to the student. Marketed events such as "Dress Like Your Favorite Superhero Day," "National Talk Like a Pirate Day," "Selfie Saturday Photo Contest," and "Singles Night," none of which suggest serious educational content, demonstrate that the AAP is primarily recreational. A use that contains merely an element of education is insufficient to qualify for protection under the Dover Amendment. *Whitinsville Retirement Society, Inc.* v. *Northbridge*, 394 Mass. at 760 (nursing home which lacked formal instruction but at which residents engaged in crafts and other entertaining activities was not educational use). Because the primary goal of the AAP is not educationally significant and does not involve a nonprofit organization using its land for educational purposes, it is not exempt from the operation of the ByLaw under G.L. c. 40A, § 3. The ZBA therefore committed an error of law in upholding the Building Inspector's determination that the AAP was entitled to the protection of the Dover Amendment.

Museum and Accessory Use

Heritage argues that the AAP is allowed by right as a museum use under the Sandwich Zoning Bylaw. Although the court gives some deference to local officials' reading of their own bylaw, the construction of a zoning enactment is ultimately a judicial function and an incorrect interpretation is not entitled to deference. *Shirley Wayside Ltd. P'ship* v. *Board of Appeals of Shirley*, 461 Mass. at 475; *Duteau* v. *Zoning Bd. of Appeals of Webster*, 47 Mass. App. Ct. 664, 669 (1999). The Bylaw defines a museum as the "premises of the procurement, care and display of inanimate objects of lasting interest and value." The AAP does not fit within this definition. In interpreting a zoning enactment, the court infers legislative intent from the plain language of

the bylaw, giving words their common meaning and usage. *Lussier* v. *Zoning Bd. of Appeals of Peabody*, 447 Mass. 531, 534 (2006). The AAP is constructed of ropes, cables and wood. It decidedly is not an inanimate object of lasting interest and value. Given the nature of its construction and use, it is fair to infer that it depreciates daily. I credit the defendants' assertion that the concept of a museum has evolved over the years, from the hidebound concept of a collection of antiques and stuffed animals to a more interactive approach. Nevertheless, the determinative fact here is that the Bylaw defines a museum quite narrowly. A conclusion that the AAP is permissible as a museum use is unreasonable based on the plain language of the Bylaw. Accordingly, the AAP is not permitted by right as a museum.

Heritage further posits that the AAP qualifies as an accessory use. Under the Bylaw, an accessory building or use is one "customarily incidental to and located on the same lot with the principal building or use, except that if more than 30% of the lot area is occupied by such use, it shall not all longer be considered accessory." While the AAP is located on a parcel of land less than 30% of Heritage's grounds, I cannot reasonably conclude that it is customarily incidental to the museum. See *Henry* v. *Board of Appeals of Dunstable*, 418 Mass. 841, 845 (1994) (incidental use is minor in significance compared to primary use and bears a reasonable relationship to it); *Harvard* v. *Maxant*, 360 Mass. 432, 438-439 (1971) (customary means commonly and by long practice established as reasonably associated with primary use, a use that is not unique or rare). First, the AAP is located on a different lot than the museum. Second, aerial courses, zip lines and related apparatus are not customarily incidental to an operation for the display of "antique buildings, works of art, household furnishings, machinery, equipment, weapons, hand carvings, artifacts, miniatures, boats, conveyances and other objects of historic interest." Nor can the AAP fairly be said to "educate the public in colonial and early American history and in the life

and work of the early settlers and their descendants or to increase the knowledge and appreciation of the public of the American heritage."

In addition, Heritage's employees are not involved in the day to day operation of the AAP. Generally, in order to qualify as an activity accessory to a religious or educational institution, the members and staff of the institution are involved in the activity. See *Needham Pastoral Counseling Ctr., Inc.* v. *Board of Appeals of Needham*, 29 Mass. App. Ct. 31, 36, rev. den., 408 Mass. 1103 (1990). Finally, under the Bylaw, the accessory uses expressly permitted in an R-1 zoning district are an "accessory apartment," "antenna," "amateur radio accessory to residential use," "camper storage accessory to residential use," and "construction trailer office, temporary accessory." The AAP does not fall under any of these uses. Thus, the AAP is not permitted as an accessory use to the operation of the HMG.

ORDER FOR JUDGMENT

It is **ORDERED** that judgment enter in favor of the plaintiffs on Counts I and II of the complaint. Because the ZBA acted arbitrarily and capriciously and on legally untenable grounds, its October 29, 2014 decision upholding the Building Inspector's grant of a building permit to Heritage Plantation of Sandwich for construction of the outdoor adventure aerial park on Parcels No. 1 and 2 on Sandwich Assessors Map No. 37 is hereby **ANNULLED**

It is further **ORDERED**, **ADJUDGED** and **DECLARED** that the outdoor adventure aerial park is not entitled to the protective treatment afforded under G.L. c. 40A, § 3 because its primary and dominant purpose is not educationally significant.

It is further **ORDERED**, **ADJUDGED** and **DECLARED** that the outdoor adventure aerial park is an unlawful use and the defendant Heritage Plantation of Sandwich, Inc. is hereby permanently enjoined from the continued operation of said aerial park.

. It is **ORDERED** and **ADJUDGED** that no party is entitled to any award of fees, costs, sanctions or any other amount.

Cornelius J. Moriarty II
Justice of the Superior Court

DATED: August 27, 2018